IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1432

STANDARD OIL COMPANY OF CALIFORNIA, *Petitioner*
v.
FEDERAL TRADE COMMISSION, *Respondent*

No. 76-1434

MOBIL OIL CORPORATION, *Petitioner*
v.
FEDERAL TRADE COMMISSION, *Respondent*

No. 76-1435

TEXACO INC., STANDARD OIL COMPANY (INDIANA),
THE SUPERIOR OIL COMPANY, INC., EXXON CORPORATION,
SHELL OIL COMPANY, *Petitioners*
v.
FEDERAL TRADE COMMISSION, *Respondent*

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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May 24, 1977

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The Chamber of Commerce of the United States of America hereby moves, pursuant to Supreme Court Rule 42(1), for leave to file a brief *amicus curiae* in support of the petitions for writ of certiorari to review the *en banc* judgment of the United States Court of

Appeals for the District of Columbia Circuit rendered February 23, 1977. This motion is necessitated by the refusal of respondent Federal Trade Commission to consent to the filing of the appended brief.[1]

The interest of the *amicus curiae,* the Chamber of Commerce of the United States, is set forth in detail in its brief. To summarize, the Chamber of Commerce is the major association of business organizations, both large and small, in the United States. The erroneous decision of the court of appeals of February 23, 1977 has vitiated the constitutional right to judicial review of subpoenas issued by administrative agencies and has undermined the doctrine of administrative collateral estoppel.

Petitioners are major industrial enterprises. Their interest in the decision of the court below is beyond question; and they will undoubtedly be adversely impacted by it in the future. We respectfully submit, however, that the burden of the judgment, if it is permitted to stand as the law of the District of Columbia Circuit, will inevitably be borne as well by individuals and entities of lesser financial resource. Their need for the protections afforded by meaningful judicial review and the doctrine of collateral estoppel is as compelling as the interests of petitioners in a proper resolution of this case.

The interests of sole proprietors, partnerships, and small and medium-size businesses cannot be represented adequately by companies such as petitioners, which can sustain the burden of regulatory excess with less material damage to their ability to do business. As *amicus curiae* in this matter, the Chamber of Commerce proposes to express the interest of all of its members, whether large or small. The patent errors of the court of appeals should be reviewed by the Court with this perspective, along with the interests of petitioners, firmly in mind.

[1]Petitioners have consented, pursuant to Supreme Court Rule 42(1).

For these reasons, it is respectfully requested that the motion of the Chamber of Commerce of the United States for leave to file a brief *amicus curiae* in support of petitions for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit be granted.

Respectfully submitted,

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INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States, *amicus curiae,* hereby urges that a writ of certiorari issue to review the *en banc* judgment of the United States Court of Appeals for the District of Columbia Circuit entered on February 23, 1977.[1]

The Chamber of Commerce of the United States is the largest association of business and professional organizations in the United States. Its direct membership includes more than 62,000 business firms, of which approximately 85 percent are small businesses. The membership of the Chamber of Commerce, taken as a whole, is not adequately represented by petitioners in this proceeding.

The judgment of the *en banc* court below deals a blow to fundamental rights of all persons and entities subject to the investigative jurisdiction of the Federal Trade Commission and every other agency of the Federal Government. The court of appeals vitiated the right guaranteed by the Fourth Amendment to the Constitution that parties subject to administrative subpoenas may seek *and may obtain* meaningful judicial review of those subpoenas. The court of appeals further overruled the doctrine established by this Court that the Government may not relitigate issues of fact determined in prior administrative proceedings.

That these erroneous determinations will severely affect petitioners is manifest on the record. But the impact of the judgment upon sole proprietors and small and medium-size businesses cannot be demonstrated adequately by petitioners. However great the injury to major industrial concerns from the judgment of the court of appeals, the most substantial losses may ultimately be incurred by enterprises endowed with the least substantial resources.

[1] Three petitions have been filed (Nos. 76-1432, 76-1434, and 76-1435) requesting review of the issues addressed herein.

The interest of the *amicus curiae* lies in the presentation of the effect of court of appeals' decision upon the *full spectrum* of American business.

SUMMARY OF ARGUMENT

Contrary to the *en banc* decision of the court of appeals, reversing the decision of the panel constituted originally to hear the consolidated proceeding below:

(a) A district court has jurisdiction in an enforcement proceeding to clarify the purpose of an administrative investigation and to limit the scope of a subpoena issued pursuant thereto based upon the constitutional and equitable precepts of relevance, burden, and fundamental fairness;

(b) The court of appeals may not substitute its judgment for the factual determinations of the district court in reviewing an administrative subpoena, in the absence of a finding that the district court committed an obvious error or abused its discretion; and

(c) An administrative agency may be estopped from relitigating factual issues previously determined by another administrative agency acting within the scope of its statutory authority.

These principles are grounded in the Constitution, settled principles of equity, and the decisions of this Court and other courts in the Federal system. Because they constitute fundamental safeguards against

burdensome overreaching by administrative agencies, their abandonment by the court of appeals is an error of the most grievous magnitude that will impact *all* business entities. Review by this Court is urgently needed to reconfirm them and to reestablish their place as immutable principles of administrative law.

REASONS FOR GRANTING THE WRIT

A. The Action of the District Court in Modifying the Subpoena Was Proper, and the Court of Appeals Erred in Reversing it.

The Federal Power Commission establishes rates for the sale of natural gas in interstate commerce based, in part, upon the supply of "proved" natural gas reserves. Beginning in 1961, the FPC held rate-making proceedings for the purpose of establishing area-wide natural gas rates for Southern Louisiana. These proceedings resulted in the establishment of tentative rates for the sale of natural gas in that area (*So La I*). Before the new rates became effective, however, the FPC commenced a second rate-making proceeding to reconsider its determination (*So La II*). The FPC's reconsideration followed a report issued by the American Gas Association (AGA) that the nation's reserves of natural gas were in decline.

In *So La II,* the accuracy of the AGA estimates of proved natural gas reserves was strongly questioned, and the FPC ordered that the accuracy of the AGA data be fully adjudicated. As a result of the proceedings in *So La II,* the FPC confirmed the reliability of those data and its decision was upheld on appeal.

Notwithstanding the FPC proceedings in *So La II,* the Federal Trade Commission, in late 1970, initiated

its own investigation into the reporting of natural gas reserves in Southern Louisiana. On June 3, 1971, the FTC issued a resolution directing the use of compulsory process and "defining" the nature and scope of the investigation as follows:

> To determine whether [certain named corporations] are engaged in conduct in the reporting of natural gas reserves for Southern Louisiana which violates Section 5 of the Federal Trade Commission Act, or are engaged in conduct or activities relating to the exploration and development, production, or marketing of natural gas, petroleum and petroleum products, and other fossil fuels in violation of Section 5 of the Federal Trade Commission Act. (A. 287.)

Pursuant to this resolution, which is utterly without practical dimension, the FTC issued exceedingly broad subpoenas to eleven natural gas producers seeking technical and highly confidential data respecting natural gas reserves. The producers immediately moved the FTC to quash these subpoenas. On June 27, 1972, the Commission denied the producers' motions to quash. Thereafter, the FTC sought enforcement of the subpoenas in the United States District Court for the District of Columbia against seven of the producer companies. The district court accepted evidence on the issues raised by all parties and conducted a full-scale hearing.

During the course of the proceedings, the court properly sought clarification of the undefined purpose of the investigation initiated by the FTC. In a colloquy between the court and counsel for the FTC the scope of the investigation was defined as follows:

> [FTC COUNSEL]: . . . What we are investigating is possible collusive conduct by the natural gas producers in the reporting of these reserves.
>
> . . . .
>
> [FTC COUNSEL]: . . . What we want to find out is whether or not in reporting natural gas reserves there has been collusive conduct in the way these estimates are prepared.
>
> THE COURT: Reporting them to whom.
>
> [FTC COUNSEL]: All right. Reporting them to the American Gas Association, because the American Gas Association data is the only available published data on these reserves. (A. 96.)

Relying on the evidentiary material presented to it as well as the representations made in open court by the FTC, the district court authorized the FTC to pursue its investigation to determine whether there existed any evidence of a conspiracy in the reporting of proved natural gas reserves by the gas producers. The accuracy of the data, it ruled, had been adjudicated and resolved in prior administrative proceedings by the agency charged with the statutory power and vested with the expertise to make such a determination. In this connection, the court found the subpoenas irrelevant, overbroad, and burdensome insofar as they sought data for the purpose of enabling the FTC to attempt to determine natural gas reserves or to question the validity or accuracy of the AGA natural gas reserve data previously verified by the FPC. Accordingly, the court modified the subpoenas to accommodate the stated objectives of the FTC while avoiding undue burden to the producers. Nevertheless, the FTC appealed.

On August 8, 1975, a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit unanimously upheld the district court's order. In October 1975, the FTC filed with the court of appeals a petition for rehearing and suggestion for rehearing *en banc*. The petition was granted, and the matter was reconsidered by a diminished majority of the court of appeals consisting of six members. Upon rehearing, a four-judge majority reversed the district court and, in effect, the panel decision of the court of appeals. A two-judge minority of the court of appeals vigorously dissented, filing a 96 page opinion.

The court's reversal was based on two grounds. First, it held that the district court was without authority to consider the evidentiary material submitted to ascertain the scope of the FTC investigation and the relevance of the subpoenas. Relevance, according to the court, is to be measured only against the general purposes of the investigation. In this connection, it further held that the court was without authority to determine whether the subpoenas were burdensome or to take into account the proprietary nature of the materials sought. Second, the majority held that principles of administrative collateral estoppel are not applicable to administrative investigations and, therefore, that the district court erred in precluding the FTC from relitigating an issue determined upon a full evidentiary hearing by the FPC and upheld upon judicial review.

The *en banc* court of appeals, by holding that the relevance of an agency's subpoena requests may be measured only against a vague standard involving the "general purposes" of its investigation, vitiated the well-established jurisdiction of the district court to

review agency subpoenas under the dictates of the Fourth Amendment. This extraordinary ruling was denounced by the dissent as follows:

> By stripping the District Court, which has reviewed countless submissions and has held two full days of hearings, of any discretion in enforcing this FTC subpoena, our colleagues have totally undermined the concept of *judicial* enforcement of administrative subpoenas. (A. 89-90.)

It is uncontested that administrative agencies have broad powers to issue subpoenas. *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946). But, contrary to the *en banc* judgment, these powers are not without dimension. The Fourth Amendment *requires* that subpoenas be "limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *See* v. *Seattle*, 387 U.S. 541, 544 (1967).

A district court has the power and the duty to review the enforcement of an administrative agency's subpoenas to keep them from being overly broad and, thereby, to prevent violations of the Fourth Amendment. *See, e.g., See* v. *Seattle, supra; Oklahoma Press Publishing Co.* v. *Walling, supra.* In *Chapman* v. *Maren Elwood College*, 225 F.2d 230, 234 (9th Cir. 1955), the Ninth Circuit Court of Appeals described a district court's authority in this regard as follows:

> There is no rule requiring a court to act against conscience. The proceeding [judicial enforcement of administrative subpoenas] is equitable in character. Equitable considerations should prevail. There is no power to compel a court to rubber-

> stamp action of an administrative agency simply because the latter demands such an action.

Further, where a district court, upon the consideration of evidentiary material, determines that an administrative subpoena is unduly burdensome, it may act to alleviate this burden by modifying the subpoena. *SEC* v. *Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974); *Adams* v. *FTC*, 296 F.2d 861, 866-867 (8th Cir. 1961), *cert. denied*, 369 U.S. 864 (196?); *Hunt Foods & Industries, Inc.* v. *FTC*, 286 F.2d 803, 811 (9th Cir. 1960), *cert. denied*, 365 U.S. 867 (1961). Modification or partial enforcement is an exercise of the district court's sound discretion and may be overturned on appeal only upon a clear error or an abuse of discretion. *FTC* v. *Lonning*, 539 F.2d 202, 211 (D.C. Cir. 1976); *NLRB* v. *Northern Trust Co.*, 148 F.2d 24, 29 (7th Cir.), *cert. denied*, 326 U.S. 731 (1945).

In reviewing the order of the district court, the *en banc* court of appeals attempted to hold a trial *de novo*. It reviewed the subpoenas item by item, ordered the parties to engage in settlement conferences, and even received evidentiary material which had not been presented to the district court (A. 45, n.66). The court then substituted its judgment for that of the district court. The dissenting opinion describes the procedure as follows:

> The Trade Commission and a majority of this Court apparently would have us proceed as if there were on appeal here an order of the Trade Commission entitled to deference as an exercise of that agency's expertise.
>
> To the contrary, this is an appeal from orders of the District Court enforcing the Commission's

> subpoena with some limiting modifications. Accordingly, it is not the views of the Commission staff which must be accorded deference but the determinations of the District Court which must be upheld unless clearly erroneous or an abuse of discretion. (A. 88.)

A district court has the power, within its sound discretion, to decide whether administrative subpoenas are irrelevant or burdensome. Findings of the district court are not to be overturned in the absence of an abuse of discretion or clear error. This Court, in *United States* v. *Nixon,* 418 U.S. 683, 702 (1974), stated the principle as follows:

> Enforcement of a pre-trial subpoena *duces tecum* must necessarily be committed to the sound discretion of the trial court since the necessity of the subpoena most often turns upon a determination of factual issues.

In a recent opinion affirming an order of a district court enforcing another FTC subpoena, the District of Columbia Circuit itself stated the standard of appellate review applicable to a district court's determination of relevance as follows:

> A finding by the district court that documents are relevant and necessary to an inquiry by the FTC is essentially factual in nature and cannot be overturned unless the district court's finding is clearly erroneous.

FTC v. *Lonning, supra,* 539 F.2d at 210 n.14.

In the instant case, the district court clarified the scope of the FTC investigation and determined the relevance of the subpoenas after lengthy hearings, taking into account evidentiary material and the

unequivocal representations of counsel for the FTC. It employed the very procedure approved by the District of Columbia Circuit and other courts, where it has been determined that questions of relevance are inextricably involved with a district court's factual investigation of an agency's intended scope of investigation. *See, Montship Lines, Ltd.* v. *Federal Maritime Board,* 295 F.2d 147, 155 (D.C. Cir. 1961); *Hellenic Lines Ltd.* v. *Federal Maritime Board,* 295 F.2d 138, 140 (D.C. Cir. 1961); *FTC* v. *Green,* 252 F.Supp. 153 (S.D.N.Y. 1966).

The dissenting opinion below aptly summarizes the error in the majority's approach:

> The majority has engaged in a standardless, directionless review of this case, and no euphemism can disguise this embarrassing fact. The majority opinion demonstrates this assertion by failing to even define the purpose of the FTC investigation which is being subject to *de novo* review, although the trial court had elucidated this quite well from FTC counsel. . . . The failure to focus on the FTC's purpose in turn causes the majority to roam into those areas committed by precedent to, and more appropriate for, the district court. (A. 163-64.)

After a full hearing, the district court determined that the FTC subpoenas were improper insofar as they permitted the FTC to attempt to determine natural gas reserves or to question the validity or accuracy of the AGA natural gas reserve data. The district court ruled that the FPC's prior determination of the accuracy of AGA data estopped the FTC from further investigation in this area. In reversing, the court of appeals held that it was inappropriate *as a matter of law* to consider the the issue of collateral estoppel at the subpoena enforcement stage of an FTC investigation.

Both this Court *and* the District of Columbia Circuit Court of Appeals have clearly stated that an agency is collaterally estopped from proceeding if a relevant factual issue has been previously determined in a contested hearing. *United States* v. *Utah Construction Co.*, 384 U.S. 394, 421-422 (1966); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940); *Pacific Sea Farers, Inc.* v. *Pacific Far East Lines, Inc.*, 404 F.2d 804, 809 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969). This Court's affirmation of the principle, in *United States* v. *Utah Construction Co., supra*, was as follows:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.

384 U.S. at 421-22.

Factual determinations made by one agency bind all agencies of the Federal Government, since, for purposes of collateral estoppel, agencies of the same government are in privity with one another. *Sunshine Anthracite Coal Co.* v. *Adkins, supra*, 310 U.S. at 402-403.

That collateral estoppel is applicable to an administrative proceeding at the investigative stage was specifically affirmed in *Safir* v. *Gibson*, 432 F.2d 137 (2d Cir.), *cert. denied*, 400 U.S. 942 (1970). The court held that the Maritime Administration, an agency of the Department of Commerce, was collaterally estopped from reinvestigating and determining an issue previously decided by the Federal Maritime Commission,

an independent agency. The court (per Friendly, J.) set forth its rationale as follows:

> The reason for applying *res judicata* to administrative agencies is not only to 'enforce repose' but also to protect a successful party from being vexed with needlessly duplicious proceedings. . . . If the latter interest is not protected at the outset of the second proceeding, it will be lost irreparably.

Id. at 143.

In abandoning the doctrine of administrative collateral estoppel, the court of appeals did more than create a direct conflict with the Second Circuit Court of Appeals. Its ruling defies principles of this Court and places businessmen in regulatory limbo. As the court stated in *Safir*, the principle of estoppel must, to be effective, have its place at *all* stages of a proceeding.

B. The Judgment of the Circuit Court Destroys Fundamental Safeguards Against Regulatory Excess.

The *en banc* court of appeals intentionally departed from settled principles by eliminating a meaningful judicial review by the district court, by arrogating to itself discretion properly lodged in the district court, and by vitiating the doctrine of administrative collateral estoppel. In its fervor to grant the FTC *carte blanche* investigative authority, it has made a shambles of safeguards that are basic to our system of checks and balances. The new regulatory environment created by the court's judgment is of tremendous concern to the Chamber of Commerce, whose members may now be subject, in practically every case, to the unchecked investigative authority of the FTC.

Congress has vested in regulatory agencies extremely broad substantive and procedural jurisdiction. Few, if any, are more expansive than the authority of the FTC to investigate and remedy "unfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce." Federal Trade Commission Act, Section 5, 15 U.S.C. § 45. *See, FTC* v. *Sperry & Hutchinson Co.,* 405 U.S. 233 (1972). It is undeniable that such authority, for whatever motivation, may be used in a manner that imposes inordinate, counterproductive burdens upon businesses of all sizes.

The instant case is a perfect example of such abuse. The FTC's resolution authorizing the natural gas investigation and thereby defining the proper scope of compulsory process is a sham. It is no more definitional (*i.e.,* restrictive) than the broad dictates of Section 5 of the Federal Trade Commission Act. The sole limitations of the resolution are that it relates to particular companies and to their activities in the petroleum and natural gas industries. (A. 287.)

By this vague resolution, the FTC sought to write itself a ticket into the files of the target corporations regardless of the burden to those firms. The district court and the original panel of the court of appeals sought properly to restrict the blanket authority that the FTC attempted to arrogate to itself while preserving for the FTC its ability to investigate the full ambit of perceived abuses within its jurisdiction. The limitations imposed were grounded in the Fourth Amendment to the Constitution, the equitable powers of the district court, and the doctrine of collateral estoppel, all as applied under the close scrutiny of the trial court upon a full, evidentiary hearing. The action of the

district court, sustained originally by the panel, was the reasonable, objective exercise of traditional judicial review under law.

The arbitrary reversal by the *en banc* court of appeals has emasculated the principle that administrative agencies, however broad their authority, will be checked by the courts when that authority is abused. To ask the question what safeguards are now available to enterprises which may be subjected to similar assaults by the FTC is to answer it. No protection may be expected under the constitutional doctrine that administrative subpoenas must be relevant and not unduly burdensome. The litigation by one federal agency (even one with the legally-designated expertise) of an issue possibly subject to the jurisdiction of another agency grants no assurance that expensive, counterproductive resurrections of the issue will not occur. In summary, there remains no objective check against investigative excesses.

That the result is contrary to law established by this Court and by circuit courts outside the District of Columbia is amply demonstrated by the petitions seeking review. The Chamber of Commerce respectfully urges the Court to examine the precedent from the perspective of all businesses, most of whom are endowed with a minute percentage of the resources of petitioners. Such businesses do not have the means to comply with oppressive regulatory demands and must be able to rely on the safeguards that the *en banc* court of appeals abandoned in the judgment rendered below.

The Chamber of Commerce submits that this Court may never have a more compelling opportunity to review and to reconfirm the proper role of the judiciary

in providing a check against administrative abuse. We urge the Court to seize that opportunity and to rectify the lower court's abandonment of the most fundamental precepts of judicial review.

CONCLUSION

Based upon the foregoing, a writ of certiorari should issue to review the *en banc* decision of the court of appeals.

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